No. 15544

United States
COURT OF APPEALS
for the Ninth Circuit

LEWIS C. DOUGALL,

Appellant,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, Judge.

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STATEMENT OF THE CASE

Plaintiff appeals from an order of the Oregon district court which denied his motion under Rule 60 of the Federal Rules of Civil Procedure for correction and relief from the judgment of dismissal which was entered on July 11, 1952 (No. 15544, Tr. 18-25). This judgment, which dismissed plaintiff's action under the Federal Employers' Liability Act to recover damages on account of

personal injuries sustained on January 30, 1946, was affirmed by this court on November 5, 1953 (207 F(2d) 843). The United States Supreme Court denied a petition for a writ of certiorari on February 1, 1954 (347 U.S. 904, 74 S. Ct. 429, 98 L. Ed. 1063). Judgment on this court's mandate was entered by Judge Fee on February 23, 1954 (No. 15544, Tr. 15-18).

The motion under Rule 60 F.R.C.P. was filed on November 21, 1956, and the order appealed from was entered on January 15, 1957. Thus, the application was made over four years after the entry of judgment and nearly eleven years after the cause of action accrued.

There is also pending before the court plaintiff's motion filed in April, 1957, for correction and amendment of this court's mandate issued on February 8, 1954. The grounds of this motion are ". . . that this Court was not apprised of the fact that the decision of the District Court was not a final order within the meaning of 28 U.S.C., Sec. 1291, and was not appealable."

Defendant has also filed a motion in this court to strike from the record an affidavit of plaintiff's present counsel which was filed in the court below over three months after the entry of the order appealed from. The ground of this motion is that the affidavit was not a part of the record before the district court and was improperly filed.

This brief will first consider the order denying plaintiff's motion under Rule 60 and will conclude with a discussion of the two other motions pending before the court.

PROCEDURAL RULE INVOLVED

Rule 60 of the Federal Rules of Civil Procedure, entitled "Relief from Judgment or Order," reads as follows:

"(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

"(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a

judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

SUMMARY OF ARGUMENT

1. The district court lacked jurisdiction to grant plaintiff any relief from the judgment of dismissal which had been affirmed by this court, since this court's mandate had not granted the trial court permission to take further proceedings.

2. Since the judgment of dismissal was entered in accordance with the district court's findings of fact and conclusions of law, there was no jurisdiction to entertain the motion for correction and relief under Rule 60 (a) F.R.C.P.

3. Even if plaintiff could have shown valid grounds for relief on account of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct (which we emphatically deny), relief on any of these grounds was barred by the one-year limitation in Rule 60 (b). The plaintiff's attempt to invoke Rule 60 (b)(6) was to no avail where all alleged grounds for relief fell under subdivisions (1), (2) or (3).

4. Even if some basis for relief under Rule 60 (b)(6) had been alleged, more than a reasonable time had elapsed, as a matter of law, between the entry of the judgment and the filing of the motion over four years later.

5. Even if the motion had been timely made, the record clearly shows that plaintiff's former counsel decided to rely solely upon the Federal Employers' Liability Act and abandoned at pretrial the inconsistent theory that plaintiff was an employee of Morrison-Knudsen, Inc., whose remedy against defendant would be under the third-party claim provision of the Workmen's Compensation Act of the State of Washington. Rule 60 (b) was not designed to relieve a party against a calculated and deliberate tactical decision made by his attorney in the course of litigation. In any event, plaintiff can show no abuse of discretion by the court below in denying relief.

6. Defendant's motion to strike from the record the attorney's affidavit filed over three months after the entry of the order appealed from should be sustained since it was not a part of the record on which the order appealed from was made.

7. Plaintiff's motion for correction and amendment of this court's mandate issued on February 8, 1954, is utterly lacking in merit since the judgment of dismissal of July 11, 1952, was an appealable final judgment. Rule 54 (b) of the Federal Rules of Civil Procedure has no application to this action. Furthermore, this court's previous decision on the merits is *res adjudicata* of plaintiff's claim that the 1952 judgment was not appealable.

PRIOR PROCEEDINGS

In view of the charges of fraud in plaintiff's motion (No. 15544, Tr. 23) and the insinuations in plaintiff's brief that defendant's attorneys intentionally overreached the plaintiff and his former attorney, the late Elton Watkins, it is necessary to review the record which demonstrates the complete lack of foundation for these charges.

The complaint was filed on January 25, 1949. Therein plaintiff sought to recover the sum of $200,000 general damages and $144,826.70 special damages on account of serious personal injuries he allegedly sustained while he was working on defendant's right of way near Goodnough, Washington, on January 30, 1946. Liability was predicated upon various allegations of common-law negligence, as well as claimed violations of several provisions of the Federal Safety Appliance Acts (No. 15544, Tr. 3-7).

The complaint stated that plaintiff ". . . brings this action against the defendant under the Federal Employers' Liability Act and the Federal Safety Appliance Act" (No. 15544, Tr. 3). It was further alleged that at the time of injury "plaintiff was in the employ of Railway Company in interstate commerce" (No. 15544, Tr. 4). Diversity of citizenship and requisite jurisdictional amount were also claimed.

Thus, under the complaint it might have been open to the plaintiff (1) to attempt to recover from defendant under the Federal Employers' Liability Act as an employee of defendant, basing liability on negligence and

violations of the Safety Appliance Acts, or (2) to attempt to assert a third-party claim as a nonemployee basing liability on common-law negligence and violations of the Safety Appliance Acts.

The record conclusively shows that at the time of pretrial in the spring of 1952 the late Mr. Elton Watkins, who was plaintiff's attorney from 1947 until his death in 1956, made a calculated and deliberate decision to stake his entire case upon the proposition that plaintiff was an employee of defendant and was therefore entitled to the protection of the Federal Employers' Liability Act, and not to rely upon plaintiff's "third-party" claim as a nonemployee of defendant.

In a proposed pretrial order drafted by Mr. Watkins and served on counsel for defendant on April 17, 1952, (No. 15544, Tr. 29-43) one of plaintiff's contentions under "Issues of Law" was that he would be entitled to recover from defendant ". . . whether plaintiff was an employee of defendant, or an employee of Morrison-Knudsen, Inc., or an invitee of defendant, or as a member of the public" (No. 15544, Tr. 39).

However, this contention was abandoned by Mr. Watkins in the final pretrial order which was agreed upon by counsel after a number of conferences prior to trial in May, 1952 (No. 13492, Tr. 3-13). It was therein provided that jurisdiction of the court was "claimed by plaintiff under and by virtue of the provisions of the Federal Employers' Liability Act, as amended" (Par. III). There were only two issues set up by the parties under "ISSUES OF FACT AND LAW." The first issue

was entitled "I Alleged Liability Under Federal Employers' Liability Act." There were only two subdivisions under this topic: "(A) Right to Maintain Action Under Federal Employers' Liability Act" and "(B) Alleged Liability for Negligence Under Federal Employers' Liability Act and Alleged Violation of Safety Appliance Act." Under subtopic (B) the two issues were prefaced as follows: "1. If plaintiff has a right of action under the Federal Employers' Liability Act . . ." and "2. If plaintiff may maintain this action under the Federal Employers' Liability Act . . ." Under the second issue entitled "Damages" it was stated: "1. If plaintiff may maintain this action under the Federal Employers' Liability Act . . ." (No. 13492, Tr. 7-10). Under the court's practice and pursuant to the agreement of the attorneys, the pretrial order superseded all pleadings (No. 13492, Tr. 13).

Issue I(A) relating to plaintiff's right to maintain his action under the Federal Employers' Liability Act was segregated for separate trial before the court on May 20, 1952. Testimony was taken, exhibits and depositions submitted, arguments made and briefs filed. Judge McColloch took the case under advisement and on May 24, 1952, filed the following opinion (No. 13492, Tr. 16):

> "With great respect for experienced counsel, I am unable to distinguish this case from the Norman case, which of course binds me both by comity within this court, and by virtue of supremacy of the appellate court.
>
> I should think that this proceeding might by amendment be converted into a third party proceeding—if plaintiff so desired—but of course both sides would be entitled to be heard as to this.

> It seems regrettable that plaintiff should lose his remaining compensation payments. Because compensation payments are so inadequate under present conditions, I believe the modern trend is to give the injured workman control of his third party claim, if one exists, and not to bind him to the harsh doctrine of election.
>
> It may appear to counsel that I am deciding this case hurriedly, but I have in mind plaintiff's interests, and I recall it was stated at the argument that the time was growing short within which plaintiff could renew his compensation claim or perhaps begin third party proceedings."

Mr. Watkins did not adopt the court's pointed suggestion to move for an amendment of the pretrial order and convert this action into a third-party proceeding on the theory that plaintiff was an employee of Morrison-Knudsen, Inc., rather than an employee of defendant. Instead he filed a motion for rehearing. On June 9, 1952, the record was reopened and plaintiff was allowed to introduce additional testimony. After further argument, the court entered an order taking the case under advisement and plaintiff filed a further brief (No. 13492, Tr. 75-91). The court filed its memorandum on the petition for rehearing on June 27, 1952, determining adversely to plaintiff the two controverted issues set up in the prertial order under Issue I(A) (No. 13492, Tr. 17).

On July 11, 1952, the court entered findings of fact and conclusions of law which in substance determined that at the time of the accident plaintiff was an employee of Morrison-Knudsen, Inc. and not an employee of defendant, and that he was not entitled to maintain the action against the defendant under the Federal Em-

ployers' Liability Act (No. 13492, Tr. 17-24). Paragraph XVI of the findings of fact stated:

> "The parties have stipulated and the Court finds that this action is brought solely under the provisions of the Federal Employers' Liability Act, and plaintiff's right to maintain this action is limited by and is to be determined solely in accordance with the provisions of the Federal Employers' Liability Act."

Prior to the date on which the findings and conclusions and the judgment of dismissal were entered, Mr. Watkins filed elaborate exceptions to the proposed findings of fact and conclusions of law, as well as requests for different findings of fact and conclusions of law. However, he did not object to proposed finding XVI (No. 13492, Tr. 25-27).

Following entry of the judgment of dismissal, plaintiff's counsel did not move for a new trial, or to alter or amend the judgment of dismissal under Rule 59, but filed a timely notice of appeal. After the affirmance of the judgment by this court, which noted (1) that the pretrial order limited and tied plaintiff's cause of action to the F.E.L.A. and (2) that another theory of action which plaintiff might have had as a nonemployee "was not advanced in the trial court" (207 F(2d) at p. 848), plaintiff did not even attempt to seek any relief in this court by way of a motion to remand the case to the district court for further proceedings on plaintiff's alleged "third-party" claim. Instead, Mr. Watkins sought a review by the United States Supreme Court, which denied the petition for certiorari, but two justices were of the

opinion that a review should have been granted (347 U.S. 904, 74 S. Ct. 429, 98 L. Ed. 1063).

This court's mandate which was issued on February 8, 1954, and entered in the district court on February 23, 1954, did not grant the trial court permission to take further proceedings herein.

Thereafter, there was no activity in this case until late 1956 when plaintiff's present counsel took charge of this litigation.

Thus, the record clearly demonstrates a deliberate and calculated choice upon the part of plaintiff through his attorney, the late Mr. Watkins, in the spring of 1952, to stake his recovery entirely upon the proposition that he was employed by defendant and therefore entitled to the benefits of the Federal Employers' Liability Act. Although he was given opportunities thereafter to reassert another theory of recovery by plaintiff as an employee of Morrison-Knudsen, Inc., Mr. Watkins concentrated throughout on the one theory of F.E.L.A. liability. He battled plaintiff's cause all the way to the United States Supreme Court, where at least two justices were of the opinion that his cause had sufficient merit to warrant review.

ARGUMENT

I. The district court lacked jurisdiction to grant plaintiff relief under Rule 60 by way of correction or relief from a judgment which had been affirmed by this court, in the absence of permission by this court.

The foregoing review of the record is probably unnecessary in view of the terms of this court's mandate which was entered in the district court on February 23, 1954. Thereunder, the district court had no discretion to disturb the judgment of dismissal which had been affirmed. Since this court had not given the district court permission to deviate from its mandate, it follows that the court below lacked the power to accord plaintiff relief under Rule 60.

The leading case so holding is *Home Indemnity Co. v. O'Brien,* 112 F(2d) 387 (C.A. 6). There the district court, following an affirmance of a judgment against a surety company, allowed an amendment to the judgment of interest at 5% from the date of the institution of the suit to the date of judgment. On appeal the order allowing the additional interest was set aside on the ground that the district court lacked power to alter or amend a decision of the court of appeals. The court held (at p. 388):

> "It being further the view of this court that subdivision (a) or (b) of rule 60, while enlarging the power of the District Courts over judgments without respect to the running of the term of court, does not confer upon District Courts the power to alter or amend a judgment affirmed by this court or by the Supreme Court of the United States, for such alteration or amendment would be not the correction of a

> mistake, judicial or clerical, but an alteration or amendment of a decision of the reviewing court, which it is not within the power of the District Courts to do."

The O'Brien case was followed by the Court of Appeals for the Third Circuit in *Butcher & Sherrerd v. Welsh,* 206 F(2d) 259, cert. den. 347 U.S. 924, 74 S. Ct. 513, 98 L. Ed. 1089, rehearing den. 347 U.S. 940, 74 S. Ct. 626, 98 L. Ed. 1089, rehearing den. 348 U.S. 939, 75 S. Ct. 354, 99 L. Ed. 736, where the court issued a writ of mandamus enjoining the district court from setting aside a judgment which had been affirmed. In that case, permission to apply for such relief had not been obtained from the appellate court and was not given by the mandate. The court rejected the argument that Rule 60(b) gave the district court power to grant relief from such a judgment without the prior approval of the appellate court. The *Welsh* case was cited as a leading case by this court in *Federal Home Loan Bank of San Francisco v. Hall,* 225 F(2d) 349, 372.

In the recent case of *Ginsburg v. Stern,* 242 F(2d) 379, the Third Circuit explained its holding in the *Welsh* case as follows (at p. 380):

> "As to the denial by the court below of Ginsburg's motion to file the amended complaint Rule 60(b), Fed. Rules Civ. Proc. 28 U.S.C., not Rule 15(a) as the court below erroneously thought, provides the basis for relief from a final judgment. Ginsburg did not attempt to bring his motion within the purview of Rule 60 (b) but it is not necessary for us to pass on the propriety of the exercise of the discretion of the court below in refusing the motion for leave to file the amended complaint. In Butcher & Sherrerd v. Welsh, 3 Cir., 1953, 206 F.2d 259, 262,

> we held that when a judgment has been affirmed on appeal and the mandate has gone down it is beyond the power of a lower court to disturb the judgment without leave of the appellate tribunal unless the mandate of the appellate tribunal authorizes it. Cf. Federal Deposit Ins. Corp., to Use of Secretary of Banking v. Alker, 3 Cir., 1955, 223 F.2d 262, In Butcher & Sherrerd v. Welsh, supra, the relief which the District Court was requested to give in respect to the affirmed judgment was not based on new grounds, grounds which were not and perhaps could not have been presented to the appellate court at the time the appeal was taken.

In the instant case, it is obvious that the grounds for relief presented to the district court by plaintiff's motion could have been raised before this court on the former appeal.

II. Since the judgment of dismissal was entered in accordance with findings of fact and conclusions of law, the district court lacked jurisdiction to grant plaintiff relief under Rule 60(a) on account of a clerical mistake or an error arising from oversight or omission.

Again, the review of the record in this case clearly shows that there was no "clerical mistake" or "error or omission" in connection with the entry of the judgment of July 11, 1952. However, assuming for purposes of argument that there was some mistake or inadvertence, the district court had no power to correct it under Rule 60(a). Of course, since Rule 60(a) carries no time limitation, and permission from this court to correct merely a clerical error probably would be unnecessary, plaintiff's brief lays considerable stress on cases decided under subdivision (a) (App. br. 17-18). However, as shown by

plaintiff's brief, they all involve purely minor typographical and clerical errors or omissions, not of a substantive nature.

On the other hand, the law is clear that where a judgment is entered in accordance with findings of fact and conclusions of law, as was the judgment of July 11, 1952, an omission, or even a serious error therein, does not constitute an error which can be corrected under Rule 60(a).

In *Gray v. Dukedom Bank,* 216 F(2d) 109 (C.A. 6), the district court, purporting to act under Rule 60(a), granted a motion to amend a judgment by adding interest thereto. On appeal, the judgment for interest was reversed on the ground that the omission of interest from the original judgment was not an error which could be corrected under Rule 60(a) since the findings of fact and conclusions of law on which the judgment was entered did not provide for interest.

West Virginia Oil & Gas Co. v. George E. Breece Lbr. Co., 213 F(2d) 702 (C.A. 5), cited by this court in *Jernigan v. Southern Pacific Company,* 222 F(2d) 245, 248, involved an alleged mistake in a compromise settlement and a judgment which had been entered thereon, whereby in dividing leasehold property certain gas producing acreage had been given to the defendants instead of to the plaintiff. Plaintiff contended that the mistake was one which could be corrected by the court at any time under Rule 60(a), but this view was rejected on appeal (at p. 705):

"Applying Rule 60 to the case before us, it is

> clear at once, contrary to plaintiff's contention, that the error in the former judgment is not a clerical one. A clerical error is generally defined as an error made by a clerk in transcribing or otherwise. Marsh v. Nichols, Shepard and Company, 128 U. S. 605, 9 S. Ct. 168, 32 L. Ed. 538. We are not concerned here with mere error in transcription. A study of the allegations of plaintiff's complaint shows that substantial interest in gas producing property has allegedly been decreed to the wrong litigant. It shows further that the correction is asked not because the judgment does not embody what the court intended and the record justified, but because it does not embody what the parties intended in making up the record. Such a mistake is one of substance which should not be corrected without a substantial showing of equitable right therefore. Hiawassee Lumber Co. v. United States, 4 Cir., 64 F.2d 417."

Similarly in *Ferraro v. Arthur M. Rosenberg Co.,* 156 F(2d) 212, 214, the Court of Appeals for the Second Circuit held, in substance, that deliberate action accurately reflected in the record cannot be denominated a "clerical error" for the purpose of invoking Rule 60(a).

Another example of the narrow scope of Rule 60(a) is found in *Hirsch v. United States,* 186 F(2d) 524 (C.A. 6). In that case, a judgment had been rendered against the federal government in an action to recover income taxes. During the pendency of the appeal, the district court, upon the government's motion and after consideration of new evidence, corrected the judgment by lowering the amount of recovery. The court of appeals, in holding the corrected judgment to be void and invalid, stated that Rule 60(a) was not applicable because the court was "* * * dealing with something other than clerical mistakes."

III. Since the motion for correction and relief from the July 1952 judgment was not filed until November 1956, the district court lacked jurisdiction of the motion even if there had been a satisfactory showing of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or some other misconduct.

Plaintiff takes the alternative view (App. br. 19), that "this particular situation was either caused by a clerical error within the meaning of 60(a) or it was a mistake within the meaning of 60(b)(6)." We have shown that there was no clerical error in connection with the entry of the 1952 judgment. It is equally clear that the district court lacked jurisdiction to consider the motion under Rule 60(b)(6).

Even if it be assumed solely for purposes of argument that the record showed valid grounds of relief from the judgment on account of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or misconduct of an adverse party, the plaintiff was barred from relief under Rule 60(b)(1) and (3) since a motion for relief on these grounds must be made not more than one year after entry of judgment.

Rule 60(b)(6) can only be invoked under the most extraordinary circumstances, and for reasons other than would justify relief under any one of the first five subdivisions of Rule 60(b). Therefore, when a motion purportedly made under Rule 60(b)(6) is, in substance, founded upon grounds included in subdivisions (1), (2) or (3) of Rule 60(b), it is barred by the one-year limitation applicable thereto.

This principle is strikingly illustrated by this court's

decision in *City and County of Honolulu v. United States of America,* 224 F(2d) 573. In that case the city moved the district court more than a year after the entry of a condemnation judgment for relief under Rule 60(b)(6) on the ground that both parties intended that the city should have a water easement which was not excepted from the judgment. On appeal from a judgment dismissing the motion, this court held that the application for relief was based upon no more than a claim of mutual mistake and, therefore, fell under subdivision (1) of Rule 60(b) rather than "any other reason" of Rule 60(b)(6). Judge Denman held (at p. 575):

> "Here again we are not concerned with the merits of this contention, for it is apparent that it is based on no more than mutual 'mistake' of paragraph (1) of 60(b) and not on the 'any other reason' of paragraph (6). Since more than a year passed after both the above judgments when the motion was filed the district court was required to dismiss it. West Virginia Oil and Gas Co. v. George E. Breece Lumber Co., 5 Cir., 213 F.2d 702, 706; Cf. Klapprott v. United States, 1949, 335 U.S. 601, 613, 69 S. Ct. 384, 93 L. Ed. 266; United States v. Karahalias, 2 Cir., 205 F.2d 331, 334."

IV. Even if grounds for relief under Rule 60(b)(6) had been shown, the motion was not made "within a reasonable time," in the absence of any explanation for the delay.

Plaintiff's motion was filed over four years after the entry of judgment, and thirty-three months after the entry of this court's mandate. The plaintiff has offered no explanation whatsoever for this long delay. Therefore, assuming only for purposes of argument that plaintiff could bring himself under Rule 60(b)(6), the motion

was not made "within a reasonable time" and denial was proper on that ground alone. While plaintiff's brief (App. br. 14) states that there is no time limit with respect to Rule 60(b)(6), it cannot be denied that the phrase "within a reasonable time" has been given a strict construction by the courts.

This court's decision in *Morse-Starrett Products Co. v. Steccone,* 205 F(2d) 244 (C.A. 9), is controlling. In that case a motion was made under Rule 60(b), twenty-two months after the entry of the original judgment, and there was no sufficient explanation for the delay. In holding that the district court properly denied the motion, Judge Orr held (at p. 249):

> "Mr. Steccone has suggested that rule 60(b)(6) was intended to broaden the power of the federal courts to give relief from judgments; that therefore the principle of the Swift & Co. case is no longer applicable. The provisions of rule 60(b)(6) were not intended to benefit the unsuccessful litigant who long after the time during which an appeal from a final judgment could have been perfected first seeks to express his dissatisfaction. The procedure provided by rule 60(b) is not a substitute for an appeal.
>
> * * * * *
>
> "Finally we note that rule 60(b) requires that a motion for relief from judgment be made 'within a reasonable time.' The present motion was filed on November 16, 1951, twenty-two months after the entry of the original judgment. No sufficient explanation has been given as to why Mr. Steccone delayed so long in seeking the relief he now requests. Hence, under the circumstances, it cannot be said that the motion was made 'within a reasonable time.' Cf. Gilmore v. Hinman, 1951, 89 U. S. App. D. C. 165, 191 F.2d 652; Cromelin v. Markwalter, 5 Cir., 1950, 181 F.2d 948."

Other courts of appeal have held that motions under Rule 60(b)(6) were not made "within a reasonable time" in the following cases: *Gilmore v. Hinman,* 191 F(2d) 652 (C.A.D.C.) [delay of sixteen months]; *Cromelin v. Markwalter,* 181 F(2d) 948 (C.A. 5) [delay of fourteen months]; *Bowles v. J. J. Schmitt,* 170 F(2d) 617 (C.A. 2) [delay of over two years]; *Jurin v. Wiltshire Parkway, Inc.,* 238 F(2d) 263 (C.A.D.C.) [delay of sixteen months].

V. Rule 60(b) was not designed to relieve a party from a free and deliberate decision made by his attorney in the course of litigation.

Even if plaintiff's motion for correction and relief had been timely made, the record clearly shows that the late Mr. Elton Watkins, who was plaintiff's counsel from 1947 until his death in 1956, decided at pretrial to rely solely upon the Federal Employers' Liability Act and, in effect, made an election to abandon the inconsistent theory that plaintiff was an employee of Morrison-Knudsen, Inc., the remedy against defendant being under the third-party claim provisions of the Washington workmen's compensation statutes. The latter claim, which was set up in the first draft of pretrial order (No. 15544, Tr. 39), was eliminated from the final pretrial order, which was limited to plaintiff's cause of action under the Federal Employers' Liability Act. It is clear that both under Rule 16 governing pretrials and under Rule 60(b), the pretrial order was and is binding upon the plaintiff. Obviously, one of the main purposes of pretrial procedure is to limit the issues to be tried, and to

define exactly the theories of recovery and defense. (*Fowler v. Crown Zellerbach Corp.*, 163 F(2d) 773 (C.A. 9), and see discussion by Judge Fee in *Clark v. United States*, 13 F.R.D. 342, 345 (D.C. Or.).) As Judge Fee stated in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 17 F.R.D. 52, 55 (D.C. Or.): "The pretrial order must after trial be binding upon all parties, as a judicial necessity." Similarly, this court has held that theories not raised and presented in the pretrial order were waived (*Frank v. Giesy*, 117 F(2d) 122, 126-127 (C.A. 9), and see 22 A.L.R. (2d) 599 et seq., *Binding Effect of Court's Order Entered After Pretrial Conference.*")

In passing, it might be helpful to the court to review some of the considerations which undoubtedly were in Mr. Watkins' mind at the time of pretrial and which influenced his decision to stake plaintiff's case solely on the F.E.L.A. liability. In the first place, the advantages of being under the F.E.L.A. were obvious: (1) assumption of risk would be no defense; (2) contributory negligence would not bar recovery but only diminish damages, and, if a violation of the Safety Appliance Acts contributed to the injury, then contributory negligence would not be a defense at all; (3) the plaintiff would have the advantage of the liberal doctrines of liability enunciated by the Supreme Court in F.E.L.A. cases.

However, it may not have been so much the advantages of F.E.L.A. coverage as the obstacles to recovery in a "third-party" action which prompted the plaintiff's counsel to rely exclusively on a claim under the F.E.L.A.

First of all, in a "third-party" action against defendant on the theory that he was an employee of Morrison-Knudsen, Inc., contributory negligence and assumption of risk could have been asserted as complete defenses against the plaintiff.

More important was the statute of limitations problem. This action had been filed just barely within the three-year limitation period of the F.E.L.A., but beyond the Oregon two-year period governing an action for an injury to the person or rights of another, not arising on contract (ORS 12.110(1)). While plaintiff's present counsel may now claim that the Oregon six-year statute (ORS 12.080(2)) would have governed on the ground that reliance upon violations of the Federal Safety Appliance Acts would make this "* * * an action upon a liability created by statute other than a penalty or forfeiture," there was a real problem presented in view of the long line of decisions by the United States Supreme Court that the Safety Appliance Acts do not create, prescribe the measure of, or govern the enforcement of the liability arising from their breach. (*Gilvary v. Cuyahoga Valley R. Co.,* 292 U.S. 57, 54 S. Ct. 573, 78 L. Ed. 1123; *Moore v. Chesapeake & Ohio R. Co.,* 291 U.S. 205, 54 S. Ct. 402, 78 L. Ed. 755; *Tipton v. A. T. & S. F. Ry. Co.,* 298 U.S. 141, 56 S. Ct. 715, 80 L. Ed. 1091; *Fairport P. & S. R. R. Co. v. Meredith,* 292 U.S. 589, 54 S. Ct. 826, 78 L. Ed. 1446.) Thus, the Oregon Supreme Court decision of *Shelton v. Paris,* 199 Or 365, 261 P(2d) 865, would have required the court below to apply the Oregon two-year statute to plaintiff's claim as a nonemployee, where the court's jurisdiction was based upon diversity of citizenship.

However, there was another more serious obstacle to recovery by the plaintiff if he attempted to sue the defendant on the theory that he was employed by Morrison-Knudsen, Inc., at the time of the accident. It was admitted in the pretrial order (No. 13492, Tr. 6) that following the accident the Department of Labor and Industries of the State of Washington had paid to plaintiff or for his account a total of $8,690.71 in accordance with the payment schedules of the Washington Workmen's Compensation Act. Thus, any common-law cause of action against a third party which plaintiff might have had was assigned to the State of Washington pursuant to § 51.24.010, Revised Code of Washington (*Anderson v. Bauer,* 146 Wn. 594, 264 P. 410 (Sup. Ct. Wn.); *Arthur v. City of Seattle,* 137 Wn. 228, 242 P. 16 (Sup. Ct. Wn.); *State v. Starr,* 185 Wn. 18, 52 P(2d) 897 (Sup. Ct. Wn.); *Kidder v. Marysville & A. Ry. Co.,* 160 Wn. 471, 300 P. 170 (Sup. Ct. Wn.)).

It is particularly significant that in March, 1950, the State of Washington moved for leave to intervene as a plaintiff in this action. The verfied petition stated that plaintiff had elected to take under the Washington Workmen's Compensation Act and had assigned any and all claims against third parties to the State of Washington (No. 15544, Tr. 10).

On July 31, 1950, Judge Fee denied the motion but with leave to renew if other grounds could be shown (No. 15544, Tr. 11). Judge Fee stated in part: "Here it is doubtful whether the cause originally was properly filed, as the statute of Washington may have vested that sovereignty with complete ownership of the cause of ac-

tion, including the power to settle or compromise [citations]. If the plaintiff has no power to institute the action or capacity to maintain it, the Court should not permit intervention." (Def. Ex.)

In making this decision, Judge Fee obviously had in mind the fundamental legal premise that if plaintiff could come within the protection of the F.E.L.A., then his federal cause of action could not in any way be affected or changed by the Washington Workmen's Compensation Act (see *South Buffalo Ry. Co. v. Ahern,* 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 395). However, the court realized that whether plaintiff was an employee of defendant or of Morrison-Knudsen, Inc., could not be determined until the trial.

Thus, with the additional obstacles to plaintiff's recovery as a nonemployee of (1) common-law defenses, (2) the two-year Oregon statute of limitations, (3) assignment by operation of law of any cause of action to the State of Washington, it is easy to understand why Mr. Watkins decided to abandon the nonemployee theory and why he elected to concentrate solely upon the F.E.L.A. theory.

This litigation ended nearly four years ago when the United States Supreme Court denied plaintiff's petition for a writ of certiorari. Plaintiff has shown no reason whatsoever why the finality of the judgment herein should be overthown.

Thus, this case is analogous to *Ackermann v. United States,* 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207. There it was held that plaintiff could not invoke Rule 60(b)(6)

to set aside a judgment canceling his certificate of naturalization where he could have filed a timely appeal from the judgment, but took the erroneous advice of a government official and decided not to appeal. Mr. Justice Minton wrote in part (340 U.S. at p. 198):

> "Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

VI. The court should allow defendant's motion to strike from the record an affidavit of plaintiff's counsel filed long after the entry of the order appealed from.

The affidavit (No. 15544, Tr. 28-29) sought to be stricken from the record was filed without the permission of the district court. More important, it was not a part of the record before the court at the time of the entry of the order appealed from. It was filed over three months later.

It is a basic rule of appellate procedure that a case must be reviewed by the court of appeals solely upon the record made before the district court. Therefore extraneous evidence or documents not a part of the record before the trial court, but filed at a later date, will be stricken from the records in the appellate court. Examples of the application of this rule are found in such

decisions of this court as *Kennedy v. United States,* 115 F(2d) 624; *Heath v. Helmick,* 173 F(2d) 156; *United States v. Goggin,* 187 F(2d) 531, and *Lee Shew v. Brownell,* 219 F(2d) 301.

VII. Plaintiff's motion for correction and amendment of this court's mandate is completely lacking in merit and should be denied.

Plaintiff has filed in this court a motion for correction and amendment of the court's mandate "* * * on the grounds and for the reason that the decision of the District Court was not a final order within the meaning of 28 U.S.C. Sec. 1291, and was not appealable."

That this motion is completely lacking in merit is readily apparent from the foregoing discussion of prior proceedings in this action.

The judgment entered on July 11, 1952 (No. 13492, Tr. 28) dismissed and terminated this action in the district court. It was entered upon findings of fact and conclusions of law which determined that plaintiff was not an employee of the defendant and could not maintain suit under the F.E.L.A. Conclusion of Law V stated in part, "The action therefore should be dismissed" (No. 13492, Tr. 24). As noted above, the trial court in its findings determined that the action was "brought solely under the provisions of the Federal Employers' Liability Act, and plaintiff's right to maintain this action is limited by and is to be determined solely in accordance with the provisions of the Federal Employers' Liability Act" (No. 13492, Tr. 23). Thus, this was not a case involving multiple claims, and Rule 54 (b) of the Federal Rules of

Civil Procedure could have had no possible application. (*Steiner v. 20th Century-Fox Film Corporation,* 220 F(2d) 105 (C.A. 9), and see cases collected at 38 A.L.R. (2d) 377, 383-386.)

Furthermore, the decision of this court which affirmed the final judgment on the merits would appear to be conclusive. Even though no objections were raised by the parties, it was the duty of this court under its decisions to have raised the jurisdictional objections on its own motion and to have dismissed the 1952 appeal if the judgment of dismissal was not final and appealable. (*City and County of San Francisco v. McLaughlin,* 9 F(2d) 390 (C.A. 9); *Robinson v. Elder,* 78 F(2d) 817 (C.A. 9); *Cutting v. Bullerdick,* 188 F(2d) 837, 839 (C.A. 9); *Van Buskirk v. Wilkinson,* 216 F(2d) 735 (C.A. 9)). Thus, the question of the court's jurisdiction to entertain the former appeal was directly in issue and was necessarily decided by the court. Since this court possessed jurisdiction to decide that it had jurisdiction, its decision on the merits is *res adjudicata* as to the finality of the judgment of dismissal. The law on this question was fully reviewed by this court in *O. F. Nelson & Co. v. United States,* 169 F(2d) 833 (C.A. 9), which is directly in point. In that case, the court denied a motion made in 1948 to recall mandates and dismiss appeals which the court had affirmed on the merits in 1945, on the ground that the previous decision on the merits was *res adjudicata* as to the finality of the decrees appealed from.

In support of the motion for correction and amendment of mandate, plaintiff relies upon the decisions of

this court in *Bergman v. Aluminum Lock Shingle Corp.*, 237 F(2d) 386 (C.A. 9), and *Walter W. Johnson Co. v. Reconstruction Finance Corp.*, 223 F(2d) 101 (C.A. 9). However, these cases involving the application of Rule 54(b) F.R.C.P. to judgments or decrees in actions containing multiple independent claims give no support to plaintiff's motion. As we have noted, the problem of multiple claims was not presented in the trial of the case at bar.

In the *Bergman case,* one claim of patent infringement and another independent claim of unfair competition were asserted. The pretrial order segregated the issue of patent validity and infringement but expressly stated that all proceedings pertaining to all of the other issues be deferred until the trial and determination of the segregated issues. An appeal was taken from a decree which found in favor of Aluminum Lock on validity and infringement, granted a permanent injunction, and ordered an accounting. The decree did not comply with Rule 54(b), and it affirmatively stated that the court reserved jurisdiction of all issues, claims and counterclaims raised by the complaint and defendant's counterclaim for unfair competition. On its own motion, this court dismissed the appeal on the ground that the independent claims of unfair competition made by both sides had not been adjudicated, and that the decree was not final and appealable.

In the *Walter W. Johnson Co.* case, the judgment appealed from merely dismissed the counterclaims. It did not adjudicate two independent claims in the complaint, and there was no compliance with Rule 54(b).

CONCLUSION

We cannot conclude without commenting upon the improper attempt by plaintiff's attorney to convey the false impression to the court that plaintiff is without remedy and has only received "a small preliminary initial allowance" from the Department of Labor and Industries of the State of Washington, which he had been called upon to refund (App. br. 27).

The court will note that it was stipulated in the May 1952 pretrial order that payments of $8,690.70 had been made to plaintiff and for payment of his hospital and doctor bills (No. 13492, Tr. 6). There is, of course, nothing in the record to show what further payments have been made to plaintiff in the intervening period of over five years.

This court's decision and the denial by the United States Supreme Court of the petition for certiorari determined once and for all that plaintiff was an employee of Morrison-Knudsen, Inc., rather than an employee of defendant. The record shows that the Department of Labor and Industries had taken the position that if plaintiff could prove he was defendant's employee and made a recovery against defendant, then he would have to refund the benefits he had received under workmen's compensation (No. 13492, Tr. 89). Quite naturally, the State of Washington backed up this position as *amicus curiae* in a brief and oral argument before this court. However, its contention was rejected (207 F(2d) 843), and ever since the denial of the petition for certiorari,

the State of Washington has not even had a colorable claim against plaintiff to recover back compensation payments. In fact, since that date plaintiff has been certain of collecting whatever additional compensation benefits were allowable under the Washington statutes.

Thus, the court must presume that the Washington officials have accorded to plaintiff all of the compensation benefits to which he would be entitled.

Finally, we wish to refute the repeated assertions in plaintiff's brief that this is a case of absolute liability under the Safety Appliance Act.

While the equipment in question which defendant permitted to be operated on its lines by Morrison-Knudsen, Inc., may have been in violation of several provisions of the Safety Appliance Act, still there were many other issues to be tried in a third-party suit by plaintiff brought under the Workmen's Compensation Act of Washington. These included the factual issues of proximate cause, contributory negligence and assumption of risk, and the legal defenses of the statute of limitations, and assignment of plaintiff's third-party claim to the State of Washington.

Defendant's case on these factual issues of proximate cause, contributory negligence and assumption of risk would depend upon the testimony of a group of plaintiff's fellow workers who were at the scene of the accident on January 30, 1946. The witnesses were employed by Morrison-Knudsen, Inc., and were not under defendant's control. The difficulties which defendant would now encounter in attempting to locate and obtain their testi-

mony is obvious. For plaintiff's counsel to argue that "* * * defendant will suffer no conceivable prejudice because the matter has not been presented at an earlier date" (App. br. 19) is most unrealistic, to say the least.

In essence, plaintiff's position is that he has a new attorney who believes that the prior litigation should have been conducted differently, and wants this court to set aside a binding pretrial order made over five years ago. On this record, Judge Healy's observation in *Frank v. Giesy,* 117 F(2d) 122, 127, is particularly pertinent:

> "Where the pretrial procedure is resorted to the spirit of the procedure must be observed."

The order denying plaintiff's motion for correction and relief from the judgment of July 11, 1952, should be affirmed; and plaintiff's motion for correction and amendment of the court's previous mandate should be denied.

Respectfully submitted,

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